

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL L. MONTALVO,

Defendant.

NO. CR 89-00062 WBS GGH

MEMORANDUM AND ORDER RE:
MOTION FOR RELIEF FROM FINAL
JUDGMENT

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A jury convicted defendant Michael L. Montalvo of engaging in a continuing criminal enterprise ("CCE") under 21 U.S.C. § 848, and he received a sentence of life imprisonment. The court denied defendant's petition for habeas corpus relief under 28 U.S.C. § 2255, and the court of appeals affirmed. Defendant now seeks to reopen that habeas proceeding and moves for relief from final judgment pursuant to Federal Rule of Civil Procedure 60(b)(6).

Rule 60(b)(6) allows the court to "relieve a party or its legal representative from a final judgment, order, or

1 proceeding" for "any other reason that justifies relief." In the
2 habeas corpus context, such motions can be subject to the
3 additional restrictions that apply to "second or successive"
4 habeas petitions under the Antiterrorism and Effective Death
5 Penalty Act of 1996. Gonzalez v. Crosby, 545 U.S. 524, 526
6 (2005). Rule 60(b) motions that seek "to add a new ground for
7 relief" or attack "the federal court's previous resolution of a
8 claim on the merits" are considered second or successive habeas
9 petitions, but motions that only address some nonsubstantive or
10 procedural "defect in the integrity of the federal habeas
11 proceedings" may proceed under Rule 60(b). Id. at 532 (emphasis
12 in original). See also United States v. Buenrostro, 638 F.3d
13 720, 722 (9th Cir. 2011) (extending Gonzalez to federal prisoner
14 § 2255 petitions).

15 Defendant moves for relief under Rule 60(b)(6) on the
16 ground that his ineffective assistance of trial counsel claim
17 never received an evidentiary hearing. Defendant contends he did
18 not know the possible sentence he faced in deciding whether to
19 accept the government's plea offer, and argues his trial counsel
20 was ineffective for failing to inform him. Defendant never
21 raised an ineffective assistance of trial counsel claim in the
22 original habeas proceeding, however, and now argues that his
23 habeas counsel was ineffective for failing to do so.

24 In Gonzalez, the Supreme Court specifically noted "that
25 an attack based on the movant's own conduct, or his habeas
26 counsel's omissions, ordinarily does not go to the integrity of
27 the proceedings, but in effect asks for a second chance to have
28 the merits determined favorably." 545 U.S. at 532 n.5 (internal

1 citation omitted). Thus, without more, the court should consider
2 defendant's ineffective assistance of habeas counsel claim a
3 second or successive § 2255 petition. See Brooks v. Bobby, 660
4 F.3d 959, 963 (6th Cir. 2011) (finding defendant's Rule 60(b)(6)
5 motion based on "general ineffective assistance of habeas
6 counsel" claim barred as "a plain-vanilla successive petition
7 designed to do nothing more than attack his earlier counsel's
8 omissions"); Ward v. Norris, 577 F.3d 925, 932 (8th Cir. 2009)
9 ("Although an assertion of ineffective assistance of habeas
10 counsel may be characterized as a defect in the integrity of the
11 habeas proceeding, it ultimately seeks to assert or reassert
12 substantive claims with the assistance of new counsel.")

13 Defendant attempts to evade this hurdle by blaming
14 misrepresentations by the government. Defendant alleges that, in
15 its initial appellate brief, the government falsely stated that
16 defendant's trial counsel was willing to testify regarding
17 counsel's advice to defendant during the plea bargain process,
18 and that defendant was aware of the sentence he faced while
19 refusing the government's plea offer. (Def.'s Resp. to Opp'n
20 17:9-20:10 (Docket No. 1097).) Defendant claims that his habeas
21 counsel relied on these representations in deciding not to raise
22 the ineffective assistance of trial counsel in the habeas
23 proceeding. (Id. Ex. G.) Instead, habeas counsel argued that
24 defendant's lack of knowledge regarding the possible sentence was
25 a violation of defendant's Due Process rights. (Id.)

26 Defendant raises serious allegations about governmental
27 misconduct, but his 60(b)(6) motion is not the proper procedural
28 vehicle to make such claims. Rule 60(b)(3) specifically

1 addresses motions seeking relief because of fraud by the adverse
2 party, but contains a one-year statute of limitations to raise
3 such claims. Defendant cannot bootstrap out of Rule 60(b)(3)'s
4 time limit by bringing a claim under Rule 60(b)(6) instead. See
5 Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863
6 n.11 (1988) (reading "clause (6) and clauses (1) through (5) [as]
7 mutually exclusive" in order to "prevent clause (6) from being
8 used to circumvent the 1-year limitations period"); Lafarge
9 Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp., 791
10 F.2d 1334, 1338 (9th Cir. 1986) ("A motion brought under 60(b)(6)
11 must be based on grounds other than those listed in the preceding
12 clauses.").

13 Alternatively, defendant suggests the court apply Rule
14 60(d)'s savings clause, which exempts claims such as "fraud on
15 the court" from Rule (b)(3)'s one year-time bar. (Def.'s Resp.
16 23:22-28.) Gonzalez recognized that "fraud on the habeas court"
17 might constitute a "defect in the integrity of the federal habeas
18 proceedings" to justify reopening § 2255 proceedings under Rule
19 60(b). 545 U.S. at 532 n.5. A Rule 60(b) motion is only proper,
20 however, when "the alleged fraud on the court relates solely to
21 fraud perpetrated on the federal habeas court." Spitznas v.
22 Boone, 464 F.3d 1213, 1216 (10th Cir. 2006) (emphasis in
23 original). If the alleged fraud on the habeas court includes or
24 implies fraud in the underlying proceeding, "then the motion will
25 ordinarily be considered a second or successive petition." Id.

26 Here, defendant alleges that the government made
27 misrepresentations in the government's brief on direct appeal.
28 Because defendant's claim does not relate "solely to fraud

1 perpetrated on the federal habeas court," the court must consider
2 the claim a second or successive collateral attack rather than a
3 true Rule 60(b) motion. Spitznas, 464 F.3d at 1216.

4 The court is without jurisdiction to consider a second
5 or successive petition under § 2255; defendant must first
6 petition to the Ninth Circuit for certification. 28 U.S.C. §
7 2255(h). Defendant has not done so. Accordingly, the court
8 lacks jurisdiction over the pending motion.

9 IT IS THEREFORE ORDERED THAT defendant's motion for
10 relief from defect in judgment (Docket No. 1085), filed March 19,
11 2013, be, and the same hereby is, DENIED.

12 Dated: October 15, 2013

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14 WILLIAM B. SHUBB
15 UNITED STATES DISTRICT JUDGE
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